No. 21456

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California, 94102.

S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

I N D E X

CITATIONS

ses:

Cases cont'd:

Interior Decisions:

erior Decisions cont'd:

stitution, Statutes and Regulations:

ellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21456

AMOS A. HOPKINS (DUKES), ET AL.,

Appellants

v.

UNITED STATES OF AMERICA, AND STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

OPINION BELOW

The district court did not write an opinion. Its findings of fact, conclusions of law, and judgment are set forth at pages 76-81 of the reproduced record.

JURISDICTION

This suit in form seeks injunctive and declaratory relief and specific performance against the United States and the Secretary of the Interior. The jurisdiction of the district court was asserted to be founded on 28 U.S.C. sec. 1353; Section

4 of the General Allotment Act of 1887, 24 Stat. 388, 389, as amended, 25 U.S.C. sec. 334; the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U.S.C. sec. 345; and the Act of February 6, 1901, 31 Stat. 760, as amended, 25 U.S.C. sec. 346 (R. 42-43). We believe the jurisdiction of the district court over the Secretary of the Interior, and the venue, in an action of this type may be founded on 28 U.S.C. secs. 1361 and 1391(e). The district court dismissed the complaint by judgment filed July 25, 1966 (R. 81). Notice of appeal was filed on September 23, 1966 (R. 84). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior's rejection of appellants' applications for Indian allotments was a reasonable exercise of the discretionary power vested in him by the Taylor Grazing Act and the General Allotment Act and was not subject to judicial revision.

1/ Cf. Coleman v. United States, 363 F.2d 190 (C.A. 9, 1966), reh. den., June 20, 1967; Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964); Lewis v. Udall, 374 F.2d 180 (C.A. 9, 1967); Dredge Corp. v. Penny, 338 F.2d 456 (C.A. 9, 1964).

2. Whether dismissal was proper as to those appellants who did not exhaust their administrative remedies.

STATUTES INVOLVED

Section 7 of the Taylor Grazing Act, June 28, 1934, 8 Stat. 1269, 1272, as amended by Section 2 of the Act of une 26, 1936, 49 Stat. 1976, 43 U.S.C. sec. 315f, reads as ollows:

> Sec. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: Provided, That locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. Where such lands are located within

grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: Provided, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

Section 7 had originally read as follows:

Sec. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: Provided, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

Section 4 of the General Allotment Act of 1887, 24 at. 388, 389, as amended, 25 U.S.C. sec. 334, provides:

> Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331—334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

STATEMENT

This action was instituted by appellants in April 1965 obtain injunctive and declaratory relief and specific perform- ce against the United States and the Secretary of the Interior

in connection with applications for Indian allotments of public lands located in the State of California (R. 2). The basic facts are undisputed and may be summarized as follows:

The 33 appellants are persons of Indian blood. Each applied to the local Land Office, Bureau of Land Management, Department of the Interior, for an Indian allotment of 160 acres of public lands pursuant to Section 4 of the General Allotment Act of 1887, supra, p. 5. Each application was accompanied by a certificate of eligibility for an allotment, which had been issued by the Bureau of Indian Affairs. The public lands applied for had been withdrawn from settlement and reserved for classification by Executive Order No. 6910 (November 26, 1934), 54 I.D. 539. For that reason, each appellant petitioned for classification and opening of the public lands to entry. 43 C.F.R. (1966 rev.) secs. 2211.0-7 and 2212.1.

After field examination and analysis of the properties described, the local Land Offices rejected the petitions and applications. The rejections were uniformly founded on a finding that the lands described are not proper for title transfer under the General Allotment Act because the lands would not support an Indian family. The bases for that finding were facts showing that the lands described are unsuited for Indian allotment

by reason of location, topography, vegetation, land tenure pattern, and general economy of the area. Seven applications (R-06410 through R-06416) were rejected also because the public lands involved had been ordered into the market for sale at public auction under the Isolated Tracts Act, R.S. sec. 2455, as amended, 43 U.S.C. sec. 1171, and 43 C.F.R. subpart 2243, prior to the time the applications were filed.[2/] Twenty-six of the 33 appellants appealed the local Land Offices' rejections, which ultimately became the Secretary's final orders.

Appellants then filed this suit on behalf of themselves and other Indians in an attempt to make the suit a class action (R. 5). Basically, the object of the action was to enjoin the United States and the Secretary from reclassifying public domain lands and to require allotment of the described lands to appellants (R. 5-7). After hearing, the district court in a memorandum opinion denied appellees' motion to dismiss appellants' complaint and declared that the action was not a proper class action (R. 8-14, 37-41).

2/ Appellants are mistaken in representing that the public lands involved in the other 26 applications were ordered into the market for sale at public auction (Br. 5-6).

In their second amended complaint, filed in March 1966, appellants sought the same type of relief as in the earlier complaints but deleted the class action aspect (R. 42-47). The district court granted appellees' motion for summary judgment--finding and concluding, after review of the administrative record as to each of the 33 claims, that the district cou had no jurisdiction to overturn the Secretary's denial of the claims because Congress had conferred upon the Secretary "discretion to examine and classify lands in the public domain for disposal." The district court also concluded that the adminis trative record showed that the denial of 26 of the 33 claims was not arbitrary, capricious, or in bad faith; and that, as t the remaining seven claims, appellants failed to exhaust their administrative remedies by not protesting and appealing the lo Land Offices' decisions to the Bureau of Land Management and t Secretary as required by 43 C.F.R. (1966 rev.) secs. 1844.1 an 2411.1-1. (R. 48, 76-78, 81.) This appeal followed.

SUMMARY OF ARGUMENT

This appeal involves 33 claims by Indians for allotment of public lands. It is the first in a series of similar cases to be presented to a federal appellate court. Numerous such cases have been recently pressed in the Department of the

terior and in the federal district courts. We believe the strict court was correct in dismissing the complaint for the llowing reasons.

A. The public lands for which appellants applied had en withdrawn from entry and disposition of any kind by execu- ve order ratified by Congress in amending Section 7 of the ylor Grazing Act. Thereafter, pursuant to statute and au- orized regulations, the Secretary of the Interior examined the blic lands involved and concluded that they were unsuited for dian settlement and allotment because the lands were unfit for ricultural development. Since Congress vested discretion in e Secretary to so do, his rejection of appellants' applications r that reason was not subject to judicial review and revision. rry v. Udall, 336 F.2d 706, 711-714 (C.A. 9, 1964), cert. den., 1 U.S. 904.

B. There is neither statutory basis, case authority, r administrative construction to support appellants' assertion at the General Allotment Act conferred on them a right to al- tment of any public lands they select and describe. Indeed, e relevant statutes, the cases, and the administrative con- ruction are to the contrary. Appellants have not "settled"

upon these particular public lands which were "otherwise appr priated" and unavailable for disposition of any kind until fa able classification by the Secretary "in his discretion." "E ment of allotment legislation does not of itself rest any rig to allotments." Wise v. United States, 297 F.2d 822, 827 (C. 10, 1961), cert. den., 369 U.S. 876.

C. The Secretary's decision, that the public lands selected should not be classified for settlement and are unsu ed for Indian allotment, is reasonable. The purpose of the a lotment system was to provide Indians with a homestead which would support them from agricultural pursuits. The public la here were found to be unsuited for such purpose. That findin is supported by substantial evidence in the administrative re cord, and is confirmed by the district court. Disposition by summary judgment was of course proper.

D. Those appellants, who did not seek administrati review of the local Land Office denials of their applications for classification and allotment, could not qualify for judic relief because they failed to exhaust their administrative re dies.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT

This appeal presents 33 claims for Indian allotment of public lands. Although the number is not extraordinary in itself, we wish to advise the Court for its information that numerous claims--identical to those in the case at bar as to nature, relief sought, and arguments and authorities in support of and against the claims--have been and are being pressed in the federal district courts within this Circuit as well as within the Tenth Circuit, and also before the Department of the Interior.[3/] All such claims have been uniformly rejected where decision has been reached. These claims are the first to be presented to a federal appellate court. Finch v. United States, 263 F.Supp. 309 (W.D. Okla. 1967), appeal pending, will follow in the Tenth Circuit (No. 9474). Of the decided cases, only

---

3/ For example, Hopkins (Dukes) v. Udall, Civ. No. 64-1648-TC, S.D. Cal.; Carney v. Udall, Civ. No. 65-219-TC, S.D. Cal.; Oliphant (Wermy) v. McClain, Civ. No. 65-246-TC, S.D. Cal.; Carmelo v. Johnson, Civ. No. 65-283-TC, S.D. Cal.; Smith v. Udall and United States, Civ. No. 65-318-TC, S.D. Cal.; McCloud v. United States, Civ. No. 1811, D. Nev., pending; Hopkins (Dukes) v. United States, Civ. No. 66-292, D. Ore.; Finch v. United States, Civ. No. 66-278, W.D. Okla., C.A. 10, No. 9474, appeal pending; Daniels v. United States, 247 F.Supp. 193 (W.D. Okla 1965); John E. Balmer, 7 I.D. 66 (1964)(Ariz.); Hopkins (Dukes), Colorado 0112669, Dept. of the Interior, December 20, 1963, unreported. Most of these cases represent a novel effort by an organization functioning under the name of the Tribal Indian Land Rights Association in most western States to obtain public lands for Indian members under the General Allotment Act.

two district courts have rendered reported opinions. Daniels v. United States, 247 F.Supp. 193 (W.D. Okla. 1965); Finch v. United States, supra. We rely on those opinions throughout this brief.

A. The Secretary of the Interior's decisions that the described public lands should not be classified as available for settlement and that the lands are unsuited for India allotment are not subject to judicial review and revision. - There can be no question of the plenary power of Congress to dispose of any kind of property held by the United States, to the extent that private rights have not vested. U.S. Const. IV, sec. 3, cl. 2; Alabama v. Texas, 347 U.S. 272, 273-274 (1 "That power is subject to no limitations. Congress has the a solute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it * * *." Gibson v. Chouteau, 13 Wall. 92, 99 (1872). This power is de gable. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1 R.S. sec. 453, as amended, 43 U.S.C. sec. 2, and R.S. sec. 24 as amended, 43 U.S.C. sec. 1201, delegated such power regardi public lands and authorized the Secretary to issue appropriat regulations relating thereto.

In Section 7 of the Taylor Grazing Act, supra, p. 3, ngress authorized the Secretary of the Interior, "in his dis- etion, to examine and classify any lands withdrawn or reserved" Executive Order No. 6910, November 26, 1934, 54 I.D. 539, ich embraces the lands involved here, and Congress specified: uch lands shall not be subject to disposition, settlement, or cupation until after the same have been classified and opened entry." Congress further provided that upon application, the cretary shall classify the tract, "and such application, if lowed by the Secretary of the Interior, shall entitle the ap- icant to a preference right to enter, select, or locate such nds if opened to entry as herein provided."

The grant of discretion is so clearly expressed that is difficult to see how any question about its existence can ise. In amending Section 7 of the Taylor Grazing Act in 1936, ngress expressly acknowledged the withdrawal effected by Exe- tive Order No. 6910 and thereby ratified it. Brooks v. Dewar, 3 U.S. 354, 360-361 (1941). Compare the original and amended rms of Section 7, supra, pp. 3-4.

That Congress was aware that it was granting discre- on and intended a grant of discretion to the Secretary are

also plain from the legislative history. Hearings, H. Committ on Public Lands, H.R. 2835, 73d Cong., 1st sess. (1933), and H.R. 6462, 73d Cong., 2d sess. (1934) pp. 138-139; Hearings, S Committee on Public Lands and Surveys, S. 2539, 74th Cong., 1s sess. (1935) p. 8. The enactment of the Taylor Grazing Act an the executive order withdrawals of 1934 and 1935 were the culmination of a long struggle by conservationists to reverse the long-standing federal policy on disposition of the public lands By its ratification of the withdrawals of 1934 Congress revers the situation where virtually all public lands not specifically withdrawn were available for the asking. John Kerr Rose, Surv of National Policies on Federal Land Ownership, S. Doc. No. 56 85th Cong., 1st sess. (1957) pp. 16-41 (Cong. Doc. Ser. No. 11992). This accords with the Secretary's statement, quoted with approval in Carl v. Udall, 309 F.2d 653, 657-658 (C.A. D.C 1962), that the "power to withhold from improper disposition a unwise uses is essential to the national policy of conservatio of the rapidly diminishing public domain and its natural resources."

When appellants filed their applications, the Secretary examined the lands and classified them, but he classified

n as unsuitable for Indian settlement and allotment. Thus, ause of the failure of one of the conditions prescribed by gress for the transfer of these particular lands from the lic domain, appellants were not entitled to them.

Appellants seek to avoid this obvious conclusion by erting that Section 4 of the General Allotment Act, supra, 5, gives them an absolute right to select any public domain ds and that the Secretary's denial of their applications must refore be arbitrary and capricious (Br. 6-16). These asser- ns are misconceived. As will be shown, that statute convey- no right in particular tracts. Wise v. United States, 297 d 822, 825-827 (C.A. 10, 1961), cert. den., 369 U.S. 876. assertions also ignore completely the clear language of Sec- n 7 of the Taylor Grazing Act, as amended, ratifying with- wal of the lands from all forms of entry and lodging author- in the Secretary, in his discretion, to classify public lands disposal or retention and preventing the acquisition of priv- rights in the land until after favorable classification. l v. Udall, 309 F.2d 653, 657 (C.A. D.C. 1962); Daniels v. ted States, 247 F.Supp. 193, 195-196 (W.D. Okla. 1965); Finch v. ted States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal

pending. See also Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended, 25 U.S.C. sec. 336, which similarly provides that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *." The Secretary's reasonable construction of the applicable statutes and his regulations is entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

Ferry v. Udall, 336 F.2d 706, 711-714 (C.A. 9, 1964), cert. den., 381 U.S. 904, considered the reviewability of the Secretary's decision where the decision is committed by Congress to the Secretary's discretion. This Court concluded that, regardless of whether review is sought in an action in the nature of mandamus or under the APA, "the Secretary's refusal to issue the certificates is not subject to judicial review" and "we are without power to review the Secretary's decision in this case," because the statute involved "commits the decision to sell to the Secretary's discretion." Moreover, the APA (now 5 U.S.C. (1964 ed.) Supp. II, sec. 701(a)) proscribes judicial review of "agency action * * * committed to agency discretion by law." 4/ (336 F.2d at 711.)

4/ The principle of nonreviewability of discretionary authority vested by Congress in the Secretary was recognized in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317-318 (1958), citing three cases involving former Secretaries of the Interior: Work v. Rives, 267 U.S. 175 (1925); United States v. Wilbur, 283 U.S. 414 (1931); and Wilbur v. United States, 281 U.S. 206 (19

The mandate of Congress is even more specific here. t follows that the disposition should be the same and that the ecretary's decisions should not be judicially revised. See lso Lewis v. Udall, 374 F.2d 180, 182 (C.A. 9, 1967); Daniels . United States, 247 F.Supp. 193, 195-196 (W.D. Okla. 1965); inch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 967), appeal pending.

B. The General Allotment Act did not confer on appellants a right of allotment to these particular lands. - In ertinent part Section 4 of the General Allotment Act of 1887, upra, p. 5, provides:

> Where any Indian not residing upon a reservation * * * shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children * * *. * * *

ppellants here seem to argue that the General Allotment Act ives them an absolute right of allotment to the lands they ave selected and for which they have applied. That argument s amiss.

The statute confers no right to specific lands. It oes confer a right to an allotment but the Secretary has not

denied appellants such right. The administrative record in these cases shows that such right is recognized--but not as to these particular lands, for valid reasons to be discussed. As the Secretary said in John E. Balmer, 71 I.D. 66, 68 (1964), "An Indian applicant is not, of course, deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land that is suitable for acquisition under the Allotment Act."

Appellants appear to rewrite the statute so as to read that "when an Indian describes public land for allotment, the Secretary of the Interior is under legal obligation to grant an allotment of the public land described." The answer is that Congress did not legislate so broadly. In Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended, by Section 17 of the Act of June 25, 1910, 36 Stat. 860, 25 U.S.C. sec. 336, Congress supplemented the General Allotment Act in providing that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *. * * *" The Executive has here determined, pursuant to congressional direction, that these public lands are not suited for Indian allotment. As enunciated by this Court in Lewis v. General Services Administration (No. 20284, Apr. 24, 19 not yet reported, "Allotments of land to Indians are made by the Secretary of the Interior."

Appellants do not satisfy other statutory requirements. n the General Allotment Act itself, Congress also required "set-lement." Appellants have not settled upon the public lands in-olved. Further, Congress specified that the public lands se-ected be "not otherwise appropriated." These public lands were otherwise appropriated" by withdrawal from all entry until favor-ble classification by the Secretary, "in his discretion," pur-uant to Section 7 of the Taylor Grazing Act, as shown above. n discussing the discretion vested in the Secretary by Section of the Taylor Grazing Act, the court, in Carl v. Udall, 309 .2d 653, 656 (C.A. D.C. 1962), stated that statutory rights of ersons entitled to selection of public lands in lieu of lands ormerly relinquished by their predecessors in title were "not ights to any particular tracts." Appellants' rights here are o more specific. There is therefore, we believe, no statutory asis for appellants' argument that their mere selection of ublic lands must be followed by allotment as a matter of right. 5/

In addition to lacking statutory basis, appellants' rgument is contrary to the decided cases and the administrative onstruction. Citing Chase, Jr. v. United States, 256 U.S. 1, -7 (1921), the Tenth Circuit declared, in Wise v. United States,

---

/ See Lewis v. General Services Administration (C.A. 9, No. 20284, Apr. 24, 1967) not yet reported.

297 F.2d 822, 827 (1961), cert. den., 369 U.S. 876, "Enactment of allotment legislation does not of itself vest any rights to allotments." The court there considered the allotment procedure in a situation involving reservation lands, and commented comprehensively (at 825):

> The legislative authority setting forth the procedure for allotments applicable here is the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C.A. § 331 et seq. The pertinent sections as hereinafter set out provide that certain administrative steps must be taken to effectuate a vested interest in an allottee. For example, "the whole subject of the distribution of the lands embraced in the reservation" rests "[with] the President, acting through the Interior Department." United States v. Fairbanks, 171 F. 337, 339, 96 C.C.A. 229, affirmed 223 U.S. 215, 32 S.Ct. 292, 56 L.Ed. 409. Thus under § 1 of the Act, the President is authorized to first cause a survey or resurvey of the Indian land "whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians" and "to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest * * *." Before any allotting may begin, there must be an administrative determination that the Indian land is suitable for agriculture or grazing, there must be a survey, and, after the survey, there must be a second administrative determination, i.e., that allotment is in the best interest of the Indians.

It ruled (at 827) that the particular allotment statute "contains no mandatory language, and it has been correctly construed by the Department of the Interior as granting where and when in the Secretary's discretion to make new allotments." That comment and ruling are applicable here.

While selection and application may segregate the land from other disposal, they do not confer a vested right to approval of the selection and application. When the Secretary actually approves an allotment, the ministerial duty arises to issue a patent. But approval itself is not a mere ministerial duty. Lemieux v. United States, 15 F.2d 518, 521-522 (C.A. 8, 1926), cert. den., 273 U.S. 749; Wise v. United States, 297 F.2d 822, 825, 827 (C.A. 10, 1961), cert. den., 369 U.S. 876. In the context of whether the right to an allotment survives death, it was stated in Woodbury v. United States, 170 Fed. 302, 305 (C.A. 8, 1909), "Until the allotment was made, Woodbury's right was personal--a mere float--giving him no right to any specific property This statement was quoted with approval by the Supreme Court in LaRoque v. United States, 239 U.S. 62, 65 (1915). See also Daniels v. United States, 247 F.Supp. 193, 194-195 (W.D. Okla.

1965); Finch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending.

The administrative construction has also been that "the vesting of rights to lands does not take place upon the making of a selection or the issuance of a certificate of selection by an agent in the field" and that an allotment is not 'made' * * * until the issuance of such patents." Raymond Bear Hill, 52 L.D. 688, 691-692(1929). "The Secretary may for good reason refuse to approve an allotment selection, but he may not cancel his approval of an allotment except to correct error or to relieve fraud. Cf. Cornelius v. Kessel (128 U.S. 456) (public land entry)." Allotment Selections on the Fort Belknap Indian Reservation, 55 I.D. 295, 301-304 (1935). See John E. Balmer, 71 I.D. 66 (1964); Clark, Jr. v. Benally, 51 L.D. 98, 101 (1925); see generally Cohen, Handbook of Federal Indian Law (Dept. of the Interior 1942) pp. 107-108, for the scope of administrative power over Indian allotments.

It is clear, we submit, that the General Allotment Act did not vest in appellants a right of allotment to these particular public lands by appellants' mere selection and application.

C. The Secretary's decisions were reasonable. - When the purpose of the General Allotment Act and the nature of the public lands involved are considered, it is apparent that these public lands are improper for Indian allotment. The thrust of the Act, as shown by the language Congress used, was to place Indians in possession and ownership of agricultural (including grazing) lands which would sustain an Indian family engaged in pastoral pursuits. This was recognized by the Supreme Court in United States v. Payne, 264 U.S. 446, 448-449 (1924), affirming this Court's answer (284 Fed. 827 (1922)), to the "question * * * whether the land, being timbered, is to be excluded from the operation of the Allotment Act which speaks only of agricultural and grazing lands." The answer was that "timbered lands, capable of being cleared and cultivated" (264 U.S. at 449; emphasis added) where so determined "in the opinion of the President" (284 Fed. at 829), are subject to Indian selection and allotment. "Before any allotting may begin, there must be an administrative determination that the Indian land is suitable for agriculture or grazing * * *." Wise v. United States, 297 F.2d 822, 825 (C.A. 10, 1961), cert. den., 369 U.S. 876.

The applicable regulations of course follow the congressional command. 43 C.F.R. (1966 rev.) sec. 2212.0-7. [6/] See generally Cohen, Handbook of Federal Indian Law (Dept. of the Interior 1942) pp. 206-215. Where pastoral pursuits on the lands selected "cannot support an Indian family," denial of the application is required. Daniels v. United States, 247 F.Supp. 193, 195 (W.D. Okla. 1965). The Secretary thus stated, in John E. Balmer 71 I.D. 66, 67-68 (1964):

> Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for

---

6/ Appellants may not validly rely (Br. 5, 16) on that portion of 43 C.F.R. (1966 rev.) sec. 2212.0-7(a) which reads:

> (3) Where an Indian makes settlement in good faith upon lands not reserved therefrom, an allotment therefor cannot be denied on the ground that the lands are too poor in quality.
> * * *

"This section by its own terms is only applicable to actual settlement on lands not reserved." Daniels v. United States, 247 F.Supp. 193, 194 (W.D. Okla. 1965) (emphasis by the court). As in Daniels and Finch v. United States, 263 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending, the Indian applicants here have not settled upon the lands involved and those lands have been reserved from entry. Clark, Jr. v. Benally, 51 L.D. 91, 93 (1925), the genesis of the regulation first expressed in Regulations, Indian Allotments on the Public Domain, 52 L.D. 383 387 (1928), demonstrates the result where the applicant had been settled upon unreserved lands for several years and had made agr cultural improvements and use.

> an Indian family, as indicated by the language of the act which allows the different acreages of land suitable for different purposes, it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act.

Since Congress has so directed, it is irrelevant that the lands selected may be valuable for uses other than agricultural. Relief from that restriction must be sought from Congress--not from suit against the Secretary who is bound by congressional direction qualifying only agricultural lands for Indian allotment.

The public lands involved in this case were found, after extensive field examination, as revealed by the administrative record, to be improper for Indian allotment because unsuited for agricultural (including grazing) use. Typical of the bases for this finding was the field report in administrative record R-05510 [1] that the lands are "entirely incapable of supporting any crop" and "would not support even a half dozen cattle" because "the lands are extremely rough, broken and boulder

---

[1] Land Report, Field Data, August 24, 1964, p. 3.

strewn. There is little or no vegetation. Soil is almost non existent * * *. The land surface in most places is solid granite * * *. Climate in the area is also extremely severe. Rainfall averages 3 inches annually * * *." [2] The lands involved in administrative record R-05712, [2] as another example, were found to be "capable of supporting less than one unit of livestock, or a total of about four units for all five applications. This number of livestock is not enough to develop a farm or ranch capable of supporting a family and providing a home. In fact, more than 100 units are required to provide an economic grazing unit. * * * the land is not suited for agricultural development. The land for which you have applied is located on

---

[1] Seven of the appellants' applications (R-06410 through R-06416) were also rejected because the lands involved had been ordered, prior to the filing of the applications, into the market for sale at public auction as "mountainous or too rough for cultivation" under the Isolated Tracts Act, R.S. sec. 2455, as amended, 43 U.S.C. sec. 1171. The orders segregated the lands from all appropriations and were therefore "otherwise appropriated" and not available for allotment under Section 4 of the General Allotment Act. Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904; Lewis v. Udall, 374 F.2d 180 (C.A. 9, 1967); 43 C.F.R. (1966 rev.) sec. 2243.1-6.

[2] Letter, Bureau of Land Management, February 19, 1965.

bedrock outcrop of impermeable basement rocks and irrigation
ells cannot be developed. No similar lands in the area are
eing used for agriculture and the history of the area is one
f failure in all attempts at agricultural development."

The administrative records as to each of appellants'
pplications were filed with the district court which expressly
ound (R. 77):

> 5. An examination of the administrative records shows that the defendants did not act arbitrarily, capriciously, or in bad faith in denying said applications.

he correctness of that finding is patent on this record and
hould be affirmed by this Court. Udall v. Tallman, 380 U.S. 1,
5-18 (1965).[10/]

10/ Appellants' contention (Br. 9-21) that they are entitled to a trial on whether the Secretary's decisions were arbitrary s without merit. Disposition by summary judgment was entirely roper. The reasonableness or arbitrariness of the Secretary's ecision is a question of law, not of fact. Even if appellants' llegations were to be construed as raising a question of whether he Secretary's decisions were supported by substantial evidence, hat too is a question of law, not fact. There is no question f unfairness or violations of procedural due process (Br. 11, 6). Of course, appellants were not entitled to a trial de novo. hey were entitled to a hearing on the administrative record. This hey were accorded. See Dredge Corp. v. Penny, 338 F.2d 456, 462-63 (C.A. 9, 1964); Carl v. Udall, 309 F.2d 653, 658 (C.A. D.C. 196 ewis v. Udall, 374 F.2d 180, 183 (C.A. 9, 1967); Ferry v. Udall, 3 .2d 706, 714 (C.A. 9, 1964), cert. den., 381 U.S. 904; Noren v. Be 99 F.Supp. 708, 709-710 (S.D. Cal. 1961); Daniels v. United States 47 F.Supp. 193, 194-196 (W.D. Okla. 1965); Finch v. United States, 63 F.Supp. 309, 310-311 (W.D. Okla. 1967), appeal pending.

D. Certain of appellants failed to exhaust their administrative remedies. - The district court found that seven of the 33 applicants, who are appellants here, did not seek administrative review of the local Land Office denials of their applications for classification and allotment.[11/] For this reason the district court concluded that it could not afford these appellants the relief sought. (R. 55, 77.)

The finding is uncontested and the conclusion is sound. The administrative procedure and the statute involved require exhaustion of administrative remedies to finality. 43 C.F.R. (1966 rev.) secs. 1844.1 and 2411.1-1; 5 U.S.C. (1964 ed.) Supp. II, sec. 704. See Mulkern v. Hammitt, 326 F.2d 896, 898 (C.A. 9 1964), and the discussion and cases cited in Davis v. Nelson, 329 F.2d 840, 846-847 (C.A. 9, 1964). As articulated in Myers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1938), it is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

11/ The applications involved are R-06410 through R-06416 (R. 77).

CONCLUSION

For the foregoing reasons, the judgment should be af-

irmed.

Respectfully,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

WILLIAM MATTHEW BYRNE, JR.,
United States Attorney,
Los Angeles, California, 94102.

S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
Attorneys, Department of Justice,
Washington, D. C., 20530.

JLY 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of
his brief, I have examined Rules 18, 19 and 39 of the United
tates Court of Appeals for the Ninth Circuit, and that, in my
pinion, the foregoing brief is in full compliance with those
ules.

RAYMOND N. ZAGONE
Attorney, Department of Justice
Washington, D. C., 20530